BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ANTHONY D. WILSON Claimant	)	
VS.	)	
UNITED PARCEL SERVICE, INC. Respondent	)	Docket No. 1,058,989
AND	)	
LIBERTY INSURANCE CORP. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the November 16, 2012, Award entered by Administrative Law Judge John D. Clark. The Board heard oral argument on March 22, 2013. Tamara J. Collins, of Wichita, Kansas, appeared for claimant. James P. Wolf, of Kansas City, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found claimant's injury arose out of and in the course of his employment, that claimant gave respondent timely notice, and that claimant has an 86 percent permanent partial general disability.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent argues that claimant's alleged injury did not arise out of and in the course of claimant's employment. Respondent further argues that claimant failed to provide it with proper notice of his alleged accident or series of accidents. Also, respondent contends claimant failed to make a timely written claim.

Claimant contends he suffered injury in a series of accidents arising out of and in the course of his employment and that he gave respondent proper, timely notice of his

series of accidents. Claimant asserts that respondent stipulated to timely written claim at the regular hearing.

The issues for the Board's review are:

1. Did claimant suffer injuries in a series of accidents arising out of and in the course of his employment with respondent?

2. Did claimant give respondent timely notice of his series of accidents?

FINDINGS OF FACT

Claimant had worked for respondent for 25 years, most of the time as a driver. At the regular hearing, claimant testified that on February 7, 2011, he was driving his truck when he felt pain in his left hip. He claimed his supervisor, Matthew McDonald, was riding with him that day as an on-job supervisor (OJS). Claimant said he told Mr. McDonald about his hip pain, said it was from repetitively pushing in the clutch of the truck, and asked to take the day off to go to the doctor. Claimant said Mr. McDonald told him he would need to call in, and claimant called in the next day.

Claimant acknowledged he did not ask Mr. McDonald for medical treatment. Claimant saw his personal physician, Dr. Steven Couch, the day after he experienced the hip pain during the OJS ride along, which would have been February 8, 2011. Dr. Couch's office records, however, indicate claimant was seen on Monday, February 7, 2011. Claimant suggested the doctor's note might be in error. However, James Hauserman, respondent's business manager, testified respondent's records show claimant did not work on February 7, 2011, and that he had called in that day. Claimant later amended his Application for Hearing to set out a date of accident of February 4, 2011, through April 18, 2011.

Claimant has had previous workers compensation claims and knew respondent's policy was that employees were to report work-related accidents immediately. Claimant said he told Mr. McDonald he had hurt himself on the job, although he admits he is not sure exactly what date that was done. Claimant could not remember if he reported a workers compensation injury to Mr. Hauserman. Claimant testified his condition continued to get worse each and every day while he continued to work. Claimant believes he was injured when he had to push in the clutch every day at work and when he would jump in and out of the truck in order to meet his time constraints to deliver packages.

Matthew McDonald, who had been an on-road supervisor for respondent in February 2011 and who was claimant's supervisor, testified he did not perform a ride along with claimant anytime in 2011. Claimant's last OJS ride along was on November 2, 2010, for claimant's annual certification. At that time, claimant was given space and visibility training and safe work methods training. Mr. McDonald said because claimant was

recertified in November 2010, there would be no reason for another OJS ride along in February 2011, unless claimant had an accident or injury. If that had been the case, it would have shown up on claimant's Employee History Profile and an OJS ride along would have been scheduled for the next day. There is nothing on claimant's Employee History Profile about an accident or injury or any OJS ride along in February 2011. Claimant's Employee History Profile shows his OJS ride along in November 2010.

Mr. McDonald testified claimant never told him he had a hip injury from his work at respondent. Claimant never reported a hip injury to Mr. McDonald during an OJS ride along. If claimant had made a complaint of pain caused by his work, Mr. McDonald would have followed respondent's injury-reporting procedures and immediately reported the injury to the manager, after which the matter would have been investigated and an accident report filled out. Mr. McDonald said claimant would have been sent to the company doctor. Mr. McDonald found out claimant had a hip problem when claimant went on disability, which was in April or May 2011.

As evidence that Mr. McDonald had performed an OJS ride along on February 2, 2011, claimant testified his time records for that day are coded as 05, which claimant said was the code entered into the DIAD board when a supervisor rides with a driver. The DIAD board is a hand-held computer into which everything claimant does is entered. The computer tracks how many miles claimant travels, how many stops he makes and how long it takes him to make a delivery or pick up a package. Claimant said when Mr. McDonald rode with him in February 2011, that information was entered on his DIAD board.

Mr. Hauserman, however, testified the 05 code listed in the column under the heading "Pay CD," simply means that claimant was paid his actual hours that day.[1] Mr. Hauserman explained that members of the teamsters union are guaranteed 8 hours of work a day. If a driver finishes a route early, respondent will find extra work so the driver can accrue 8 hours. The Pay CD for days a driver is paid the guaranteed 8 hours is 06. If for some reason a driver finishes early and wants to leave work, the driver can elect to be paid for his actual time, and his Pay CD for that day would be coded 05. Mr. Hauserman said the 05 and 06 codes have nothing to do with whether a supervisor performs an OJS ride along.

Mr. Hauserman testified that if an employee reports an injury, it is entered into a computer system known as SHURMIS, packets are filled out, health and safety is notified, and depending on the nature of the injury, a supervisor rides with the employee the next day. Mr. Hauserman also confirmed that claimant did not have an OJS ride along after November 2, 2010, and there would have been no reason for claimant to have had one. Claimant was not involved in any crashes or reported any injuries. Mr. Hauserman said

[1] See McDonald Depo. (July 31, 2012), Ex. 4.

if there had been an OJS ride along, it would have been entered in the DIAD, and that information could have been pulled up from the computer.

On April 18, 2011, claimant went to Mr. Hauserman's office. Mr. Hauserman said respondent has a one-on-one meeting each spring with any driver who had previously suffered a heat-related condition. Because claimant had suffered heat stress at work on a couple of occasions, Mr. Hauserman met with claimant. Mr. Hauserman said at that meeting, he noticed claimant was favoring his left hip. Mr. Hauserman asked what was wrong, and claimant said he had bursitis, had been getting shots, and might need to have surgery. Claimant did not say the hip condition was caused by the truck's clutch or by climbing in or out of the truck. Claimant said Mr. Hauserman gave him a Loss of Time Claim Form–Initial Report of Disability, but Mr. Hauserman said he does not keep those forms and claimant would have gotten the form from the union hall. When claimant filled out the form, he neglected to answer the parts of the form that asked when, where and how the accident occurred. Claimant did not indicate his condition was work-related.

Claimant took the form to Dr. Couch to complete the physician's portion of the form. Dr. Couch wrote that claimant had arthritis in his left hip. Dr. Couch indicated claimant's condition was not due to his employment.

After claimant saw Dr. Couch on February 7, 2011, Dr. Couch referred him to an orthopedist, Dr. Mohamed Mahomed. Dr. Mahomed performed left hip replacement surgery on claimant on June 16, 2011. Claimant testified he had restrictions that respondent was unable to accommodate, and he has not worked since April 18, 2011.

Only one physician testified in this case. Dr. Pedro Murati, a certified independent medical examiner who is also certified in physical medicine and rehabilitation and electrodiagnosis, evaluated claimant on January 27, 2012, at the request of claimant's attorney. Claimant complained of hip pain. After a physical examination and a review of claimant's medical records, Dr. Murati noted claimant was status post left hip replacement, which he opined was, within a reasonable medical probability, a direct result of the work-related injury that occurred every working day to April 15, 2011, during claimant's employment at respondent. Using the AMA *Guides*,[2] Dr. Murati found claimant had a 20 percent whole person impairment.

Dr. Murati issued permanent restrictions that claimant should not drive a manual shift vehicle and should not use left lower extremity repetitive foot controls. Claimant should rarely climb stairs and ladders and occasionally walk and stand. Claimant could lift/carry/push/pull to 50 pounds but only occasionally. He could occasionally lift/carry/push or pull to 50 pounds, frequently to 35. Dr. Murati reviewed the task list prepared by Jerry

[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Hardin.[3] Of the 11 tasks on the list, he opined claimant was unable to perform 8 for a 73 percent task loss. The ALJ found a 72.7 percent task loss.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[4] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[5]

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensa tion act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

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[3] Jerry Hardin, a personnel and human resource consultant, met with claimant on February 28, 2012. Mr. Hardin prepared a list of 11 tasks claimant had performed in the 15-year period before claimant's accident.

[4] K.S.A. 2010 Supp. 44-501(a).

[5] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[6]

K.S.A. 2010 Supp. 44-508(d) and (e) state:

> (d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work-related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.
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> (e) ''Personal injury'' and ''injury'' mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

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[6] *Id.* at 278.

ANALYSIS

The primary issue in this case is whether claimant gave respondent notice of a work-related injury. In order to make a finding regarding whether notice was given, the Board must first determine the date of accident. Claimant alleges he told respondent about the work-related accident in February and April 2011. Respondent denies receiving notice of the work-related injury until the Application for Hearing was filed by claimant in December 2011.

The ALJ held that the date of accident was April 15, 2011. That issue was not appealed by either party. As such, April 15, 2011, will be the date that triggers the ten-day notice requirement contained in K.S.A. 44-520.

Claimant testified he told his supervisor, Matthew McDonald, that his hip was hurting on February 7, 2011. Mr. McDonald denies this assertion. Claimant testified Mr. McDonald was riding in the truck with claimant that day to monitor claimant's work practices. Respondent provided evidence that there was no supervisor riding with claimant any time close to the dated alleged. Later, claimant changed his testimony to reflect that the supervisor ride along could have been sometime between February 2 and February 5, 2011.

Claimant testified he believed he reported the injury.[7] His description of the notice was, "I told him that my hip was hurting and that I needed to go see the doctor because it was very painful."[8] The Board finds this statement, by itself, is not notice of a work-related injury. Claimant did change his testimony at a continuation of the regular hearing by deposition taken September 4, 2012. At the deposition, three months after the Regular Hearing, claimant changed his testimony and stated he told Mr. McDonald that his hip was hurting and that he "injured it by pushing that clutch in and jumping in and out of the truck."[9] The Board does not find this recantation, which contains a very specific causation statement, to be credible.

Claimant testified he knew he was to report work-related injuries immediately. Claimant had experienced prior workers compensation claims and knew the requirements. Claimant testified he had received training on reporting accidents. Yet on this occasion, claimant did not ask respondent to complete an accident report or provide medical treatment. Claimant testified he did not ask Mr. McDonald to send him for medical treatment.

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[7] R.H. Trans. at 25.

[8] *Id.* at 15.

[9] Continuation of a Regular Hearing, Depo. of Anthony Wilson, (Sept. 4, 2012) at 8.

Claimant testified he saw Dr. Couch, his family physician, on February 8, 2011, about his hip pain. Claimant was "pretty" sure February 8 was the only day of that week he took off work because of his hip pain. Claimant also testified that he saw Dr. Mahomed on March 9, 2011, upon a referral by Dr. Couch. Claimant did not ask respondent to pay for any of these medical services.

After his return to work, claimant's hip condition worsened. His last day of work was April 15, 2011. On April 18, 2011, claimant applied for short term disability. The loss of time claim for short term disability had three sections which were completed by Dr. Couch, claimant and James Hauserman. The question asking if the disability was in any way work related, which required claimant to check "yes" or "no," was left blank by claimant. When asked if the condition was related to claimant's employment, Dr. Couch checked "no." Mr. Hauserman, who completed the form for the employer, checked "no" when asked if a claim had been filed for workers compensation benefits.[10]

There is no evidence that respondent was notified of a work-related injury by claimant between his last day of employment and the date the Application for Hearing was filed. Claimant testified he noted that the injury was work related on the short-term disability form. Claimant admitted the short-term disability form was the only written document provided to respondent. Contrary to claimant's recollection, the short-term disability form to which he referred contained no indication that claimant suffered a work-related injury.

The weight of the evidence supports a finding that it is more probable than not that, prior to the filing of the Application for Hearing with the Division, claimant did not tell respondent he suffered a work-related injury, that claimant never asked respondent to pay for his medical expenses related to his alleged hip injury, and that claimant did not notify respondent of a work-related injury when he applied for short-term disability on April 18, 2011.

As stated above, the Board finds that claimant did not report an accidental injury in February 2011. Claimant's recollection was shown to be deficient in regard to the date upon which he alleges to have told Mr. McDonald that he suffered a hip injury. Claimant was sure that the date was February 7, 2011, but then changed his testimony. Respondent submitted evidence that the alleged OJS ride along where claimant gave notice of an injury did not occur on the date alleged. The records provided by respondent show that the OJS ride along closest in time to the one alleged was four months earlier, in November 2010.

Even if the Board found that timely notice of an injury had been given, it would also be found that claimant has failed to prove by a preponderance of the evidence that an

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[10] Hauserman Depo. (July 31, 2012), Ex. 6.

accidental injury arose out of his employment due to questions regarding claimant's credibility. Claimant changed his testimony between the regular hearing and the continuation regarding what he told Matthew McDonald. Claimant testified he was "pretty sure" he noted that he checked the box indicating a work-related injury on the short-term disability form, which was proved not to be the case. He was absolutely sure he told Mr. McDonald that he had a work injury on February 7, 2011. This was proven not to be true. The filing of an Application for Hearing coincides with claimant's failure to receive a response from Aetna on his application for long-term disability. For all of these reasons, the Board finds that claimant did not suffer an injury by accident arising out of his employment with respondent.

CONCLUSION

Based upon the foregoing, the Board finds that claimant failed to sustain the burden of proving he suffered an injury arising out of and in the course of his employment with respondent and that claimant failed to provide notice of an alleged injury pursuant to K.S.A. 44-520.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated November 16, 2012, is reversed

IT IS SO ORDERED.

Dated this _____ day of April, 2013.

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BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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John D. Clark, Administrative Law Judge